United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,855

PEAT, MARWICK, MITCHELL & Co.,

Appellant,

v.

COMPTROLLER OF THE CURRENCY,

Appellee.

Appeal From the United States District Court for the District of Columbia

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STATEMENT OF QUESTIONS PRESENTED

Where a national bank files suit claiming $3,500,000 in damages resulting from a national accounting firm's alleged omission of certain facts from a financial statement,

(a) is the defendant firm entitled to inspect and copy portions of a 6-year old national bank examiner's report, which the bank itself received, for the purpose of showing that the bank had notice of the facts allegedly omitted?

(b) are portions of a bank examiner's report to the Comptroller of the Currency entitled to immunity from discovery even though copies were sent to the subject bank?

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia entered February 2, 1967 quashing a foreign subpoena insofar as it required production of national bank examiners' reports (J.A. 22a). Jurisdiction of the District Court was based on 14 D.C. Code § 103 (1966 Supp.). Jurisdiction

of this Court is invoked under 12 U.S.C. § 1291. See *Carter Products, Inc.* v. *Eversharp, Inc.*, 360 F. 2d 868, 870-872 (7 Cir. 1966); *Horizon Titanium Corporation* v. *Norton Co.*, 290 F. 2d 421, 422-424 (1 Cir. 1961).

STATEMENT OF THE CASE

The subpoena quashed by the District Court originated in a suit brought in the Superior Court of California for Marin County by Bank of America National Trust & Savings Association ("Bank") against a national accounting firm, appellant herein, to recover $3,500,000.00 in damages for losses allegedly incurred by the Bank in extending credit to Otis, McAllister & Co. ("Otis"), now bankrupt. The loans were made from 1958 to 1961 and the losses occurred prior to the adjudication of Otis as a bankrupt in 1962. (J.A. 11a)

In its California Complaint, the Bank claims, inter alia, that in extending credit to Otis, it relied on allegedly erroneous financial reports prepared by the defendant, Peat, Marwick, Mitchell & Co. ("P.M.M."), appellant herein. In its answer, defendant P.M.M. asserts, inter alia, that the Bank knew or should have known of Otis' true financial condition and that its losses were the result of its own negligence. (J.A. 10a)

In prior discovery proceedings, appellant P.M.M. established that a national bank examiner's report on the plaintiff Bank dated January 28, 1958, commented adversely on the Bank's loans to Otis, a factor which would rebut the allegations in the Bank's complaint and support P.M.M.'s defense that the Bank was itself negligent in extending the credits at issue. It is admitted that the Bank received a copy of that report.

Appellant moved for production of that report in the California court but the Bank refused to produce it upon instructions from the Comptroller of the Currency (whose

property it allegedly was, J.A. 7a) and the California court told appellant to obtain the Comptroller's consent. Accordingly, on July 30, 1965, appellant wrote the Comptroller requesting inspection and/or copies of the relevant portions of the pertinent documents. On August 25, 1965, the Comptroller denied the request on the ground that "it would be contrary to the long-established policy of this Office".[1] (J.A. 9a)

On August 31, 1965, counsel for appellant requested the Secretary of the Treasury to overrule the Comptroller's decision. The request was denied on September 21, 1965 for the reason that "it would be contrary to long established policy" and that "the voluntary public disclosure of the reports of examination of a national bank and related correspondence would be inimical to the public interest". (J.A. 9a)

The California court subsequently issued a commission to take the deposition of the Comptroller in the District of Columbia, and Foreign Subpoena No. 79-66 issued from the District Court pursuant thereto. Cf. D.C. Code, Title 14, § 103 (Supp. 1966).

In an effort to work out a practical resolution of this problem without the need for judicial intervention, appellant's counsel indicated willingness to accept in lieu of the actual reports either (1) excerpts from the reports pertaining to the transaction in question, or, (2) a statement on deposition by the Comptroller (or his representative) as to the comments contained in the reports with regard to the Otis loan.

Nevertheless the Comptroller moved the District Court to quash "or modify" the subpoena duces tecum and

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[1] This "long established policy" was previously based on the "housekeeping statute", 5 U.S.C. § 22. But in 1958 Congress amended that law so as to provide that "this section does not authorize withholding information from the public or limiting the availability of records to the public."

the court below granted the Comptroller's motion without opinion. On February 2, 1963 it entered an order to quash the subpoena "insofar as it requires the production of national bank examiners reports".[2] (J.A. 22a)

STATUTES INVOLVED

12 USC § 481 provides:

> The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every national bank twice in each calendar year, but the Comptroller, in the exercise of his discretion, may waive one such examination or cause such examinations to be made more frequently if considered necessary. The waiver of one such examination as above provided shall not be exercised more frequently than once during any two-year period. The examiner making the examination of any national bank shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency: Provided, That in making the examination of any national bank the examiners shall include such an examination of the affairs of all its affiliates other than member banks as shall be necessary to disclose fully the relations between such bank and such affiliates and the effect of such relations upon the affairs of such bank; and in the event of the refusal to give any information required in the course of the examination of any such affiliate, or in the event of the refusal to permit such examination, all the rights, privileges, and franchises of the bank shall be subject to forfeiture in accordance with sections 141, 222-225, 281-283, 285, 286, 501a and 502 of this title. The Comptroller of the Currency shall have power, and he is authorized, to publish the report of his examination of any national banking association or affiliate which shall not

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[2] The Comptroller's office has no documents other than Bank Examiners' Reports which are responsive to the subpoena (J.A. 4a).

within one hundred and twenty days after notification of the recommendations or suggestions of the Comptroller, based on said examination, have complied with the same to his satisfaction. Ninety days' notice prior to such publicity shall be given to the bank or affiliate.

14 D.C. Code § 103 (1966 Supp.) provides:

> When a commission is issued or notice given to take the testimony of a witness found within the District of Columbia, to be used in an action pending in a court of a State, territory, commonwealth, possession, or place under the jurisdiction of the United States, the testimony may be taken by leave of a judge of the United States District Court in like manner and with like effect as other depositions are taken in United States district courts.

STATEMENT OF POINTS

The court below erred in quashing the subpoena duces tecum calling for production of the relevant bank examiners' reports.

SUMMARY OF ARGUMENT

The national bank examiners' reports sought by the subpoena duces tecum are essential to appellant's defense in a $3,500,000.00 suit brought against it by the subject bank. None of the reasons given by the Comptroller for withholding the reports are applicable to the facts of this case: The reports are over six years old, the portions sought relate solely to loans to a now bankrupt corporation, and the bank's losses in making the loans have all been publicly disclosed in the bankruptcy action and in its suit against appellant.

The immunity to judicial discovery which the Comptroller asserts has not been granted either by Congress or the courts. Where relevant to an issue pending adjudication, the courts have required production of bank examiners' reports subject to appropriate safeguards.

The Comptroller's position that he may furnish copies of relevant bank examiners' reports to a plaintiff bank and withhold them from a defendant sued by that bank is a form of administrative "clientism" which violates the most fundamental standards of fairness to litigants.

ARGUMENT

I. The Reports in Question Are Over Six Years Old and Their Disclosure for the Limited Purpose Sought Here Will Not Offend Any of the Safeguards Which the Comptroller Is Seeking To Protect.

In his Affidavit in support of this motion to quash, the Comptroller stated that bank examinations are periodically made by his office in the performance of his statutory duty of supervising and regulating national banks; that the results of such examinations are set down in reports; that the Comptroller's Office has always regarded these reports as confidential (¶ 4 J.A. 5a.); and that the possibility that reports of examination might be required to be produced in court would make banks "reluctant" to furnish the required information and might therefore impair the Comptroller's ability to perform his statutory duty (¶ 5 J.A. 5a).

The Comptroller of the Currency is not, however, dependent upon the willingness or reluctance of a subject bank in the performance of his regulatory functions. National banks are required to submit to bank examination by statute. The Federal Reserve Act (12 U.S.C. § 481) gives the Comptroller the power to make a thorough examination of all the affairs of a national bank, including the power to examine its officers and agents under oath. The bank has no choice of whether or not it will submit to examination and furnish the required information. A bank's refusal to cooperate can result in forfeiture of the bank's charter and/or a penalty of $100 a day. The willingness or reluctance of a subject bank to furnish information cannot, therefore, impede the Comptroller in the per-

formance of his statutory duty. *Boeing Airplane Co.* v. *Coggeshall,* 108 App. D.C. 106, 113; 280 F. 2d 654, 661 (D.C. Cir. 1960); *Wirtz* v. *Baldor Electric Co.,* 119 App. D.C. 122, 337 F. 2d 518, 527 (D.C. Cir. 1964).

The Comptroller goes on to assert that "the reports of examination contain sensitive financial information of a large number of customers not involved in the litigation the disclosure of which information would adversely affect their interests" (Affidavit ¶ 6 J.A. 5a). The only information sought by this subpoena pertains to a specific transaction which the subject Bank has itself opened up in the pending California action. Appellant agreed that information about other transactions involving other customers could be physically expunged from the copy of the report produced in response to this subpoena.[3]

The Comptroller further speculates that inability to evaluate the reported information might weaken public confidence in a national bank if bank examiner reports were made a matter of public record (Affidavit ¶ 7 J.A. 5a). But the limited disclosure for the limited purpose sought by this subpoena poses no such threat. The facts involved are already matters of public record in the bankruptcy action against Otis and in this California suit which was instituted by the subject Bank itself. The only issue raised here is whether the plaintiff Bank had notice of them at the time it made the loans in question. It is unfair to permit the Bank to hide behind a protective screen erected by the Comptroller for its benefit.

The reports at issue refer to matters which occurred between 1958 and 1961. They are now of purely historical interest to all except the parties to the California litigation.

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[3] The Court by protective order may limit the use of the subpoenaed report in any manner so as to prevent any misuse of the information supplied. *Rosee* v. *Board of Trade of the City of Chicago,* 35 F.R.D. 512; 36 F.R.D. 684 (N.D. Ill., E.D. 1964-1965).

In a similar suit brought against appellee a similar request for New York bank examiners' reports was made and the reports were produced voluntarily by the New York State Banking Department. See ¶ 10 of the Norberg Affidavit and Exhibits B and C annexed thereto. (J.A. 11a-12a, 13a, 17a-18a). These exhibits are illustrative of the highly probative nature of the reported information.

II. The Immunity From Judicial Discovery Now Claimed by the Comptroller of the Currency Is Not Justified Either by Statute or by the Weight of Judicial Opinion.

There is no statutory authority which forbids the production of excerpts from the bank examiner's reports in the circumstances of this case. The statute cited by the Comptroller, 12 U.S.C. § 481, does not do so. It specifically authorizes the publication of a bank examiner's report in its entirety when a bank fails to heed the Comptroller's recommendations. It says nothing about the limited disclosure of a report or portions of a report that may be germane to an issue pending adjudication subject to appropriate judicial safeguards. It certainly does not purport to bar such disclosure of the contents of a report six or eight years after it was issued.

Bank of America National Trust and Savings Assn. v. *Douglas,* 70 App. D.C. 221, 105 F. 2d 100 (1939), on which the Comptroller also relies, provides no precedent for the unreasonable position he has taken in this case. A different issue was presented by that case and any factual resemblance between the two cases ends with the identity of bank involved. Bank of America brought that suit to prevent the Securities & Exchange Commission from using bank examiners' reports which had previously been furnished by the Secretary of the Treasury in connection with a pending investigation. The Court rejected the Bank's contention that this was unlawful and held that the Secretary had properly supplied the reports. The Securities & Exchange Commission explicitly stated that it "did

not intend or desire to introduce the reports in evidence" (105 F. 2d at 105). Hence the Court's opinion did not reach the question presented here.

Moreover, the *Douglas* case involved the use of current bank examiners' reports against the subject Bank or its subsidiary. The instant case involves the production of stale reports, made six to eight years ago, in a suit brought by the subject Bank itself.

In *Overby* v. *U.S.F. & G. Co.*, 224 F. 2d 158 (5 Cir. 1955), the Court of Appeals for the Fifth Circuit rejected the Comptroller's arguments against disclosing bank examiners' reports regardless of their relevancy to the issues pending adjudication. There a bank sued a surety company for losses incurred through a dishonest employee. The surety sought the bank examiners' reports to show that the bank had knowledge of the dishonesty but failed to notify the surety as required by the bond. The District Court denied the Comptroller's claim of privilege and ordered production of the bank examiner's reports. The Court of Appeals remanded the case for the purpose of excluding disclosure of irrelevant material; but insofar as the reports were germane to the matter at issue, they were held subject to discovery[4] and the Comptroller's claimed immunity was denied.

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[4] The public policy against carving out exceptions to the discovery provisions of the Federal Rules of Civil Procedure was well stated by the Chief Judge of the United States District Court for the District of Columbia in *Tansey* v. *Transcontinental & Western Air:*

> "One of the purposes of the Federal Rules of Civil Procedure is that where good cause is shown there shall be made available to litigants the facts in a case without regard to which party develops them. The cause of justice is promoted by the disclosure of facts. It seems to me the court will not be justified in deciding that an exception to such a disclosure is intended in a particular class of cases, unless such intention is found to be clearly expressed."

97 F. Supp. 458, 461 (D.D.C. 1949). Cf. *Westinghouse Electric Corp.* v. *City of Burlington, Vt.*, 102 App. D.C. 65, 351 F. 2d 762, 766 (D.C. Cir. 1965).

See also *Bank of Dearborn* v. *Saxon*, 244 F. Supp. 394 (1965) and *Community National Bank of Pontiac* v. *Gidney*, 192 F. Supp. 514 (1960), aff'd 310 F. 2d 224 (6 Cir. 1962), where the Court held "that a limited production of the documents in issue would not be barred by any established principle of privilege" if the documents were needed for decision. 192 F. Supp. at 519.

The most recent case subjecting a bank examiner's report to discovery in the face of the Comptroller's claim of immunity is *U. S.* v. *Provident National Bank, et al.*, 41 F.R.D. 209 (E.D. Pa., November 22, 1966). The court ordered production of 16 national bank examiners' reports under Rule 34 subject to protective measures "to guard against making public facts which are not relevant and which could be unnecessarily injurious to the defendant Banks and/or their customers".

The court noted that national bank examiners' reports are comprised of two sections: (1) the body of the report of which the bank receives a copy, and (2) a confidential report sent only to the Comptroller. It overruled the Comptroller's claim of privilege as to the first part of the reports, finding them "relevant not only for the facts which they contain, but also for the context in which the facts appear". 41 F.R.D. 210. As to the confidential portion of the reports, the court denied discovery, noting on the basis of its own *in camera* examination that they "add no new relevant facts not in the body of the report" and that "[b]asically they are the candid opinions, good or bad, correct or incorrect, of the examiner on the bank he has examined". Ibid.

Appellant here has asked to see only those portions of the examiners' reports which the bank itself saw and which relate to the loans in issue. Appellant has further indicated willingness to work out protective measures like those adopted by the courts in the above cases so that "the competing interest of the administration of justice and of

governmental privilege may be reconciled''. *Overby* v. *United States Fidelity & Guaranty Co.*, 224 F. 2d at 165. The Comptroller of the Currency, however, has refused to consider making any disclosure, no matter how limited and no matter what protective measures might be adopted.

At oral argument, counsel for appellant offered to restrict the scope of the subpoena so as to reach only those portions of the reports which were sent to the plaintiff bank and so as to exclude the confidential portions.

The court below, however, made no *in camera* inspection of the reports in question and it made no determination as to which portions contained relevant facts and which were merely confidential expressions of the examiner's opinion. At the conclusion of the argument on the Government's motion to quash, the court took the case under advisement and subsequently entered an order, without opinion, granting the Government's motion in its entirety. There is consequently no indication of the reason for the lower court's action.

The argument the Comptroller makes may have some plausibility in the case of confidential sections of the bank examiners' reports. To the extent, however, that the Comptroller did not himself keep the reports confidential but disclosed them to the subject bank, he cannot properly deny them to a party sued by the bank. In insisting that he can, the Comptroller is treating the banks subject to his regulatory jurisdiction as though they were clients to be favored and protected in their disputes with third parties regardless of the interests of justice.

Where a report is germane to the issue in a suit initiated by a national bank, the party defendant should be permitted to see any portions of it that the bank itself has seen. To hold otherwise would violate the most fundamental standard of fairness to litigants.

CONCLUSION

For the foregoing reasons, the District Court's order quashing the subpoena duces tecum herein should be reversed.

Respectfully submitted,

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JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Parties

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, *Plaintiff*,

v.

PEAT, MARWICK, MITCHELL & Co.,
Defendants and Cross-Complainants

v.

THE CHASE MANHATTAN BANK, ET AL.

Action

To Quash or Modify Foreign Subpoena

Petitioner's Atty.

J. William Doolittle
C. Westbrook Murphy
Department of Justice
Atty. for Comptroller
Respondent's Atty.

Docket Entries

Date	*Proceedings*	*Fees*	*Total*

1966

Oct. 28—Motion of Comptroller of the Currency to quash or modify foreign subpoena No. 79-66; affidavit; P's&A's c/s 10-28-66; MC filed

Nov. 3—Stipulation extending to and including 11/18/66 time for deft. Peat to oppose motion to quash or modify Foreign Subpoena #79-66. filed

Nov. 7—Deposit by Schuchat .25¢ filing fee. Fees 25 Total 25

Nov. 18—Points and authorities of defendant #1 to motion of Comptroller of the Currency to quash or modify foreign subpoena; exhibit "A"; affidavit and exhibits A, B, and C; c/m 11/18/66; deposit 75¢ by Michael A. Schuchat. filed Fees 75 Total 75

1967

Jan. 11—Reply brief for Comptroller of the Currency in support of motion to quash or modify subpoena; appendices A, B and C; affidavit; c/m 1-11-67. filed

Jan. 13—Motion of comptroller to quash or modify subpoena argued and taken under advisement. (Rep.:J. Blair) Matthews, J.

Feb. 2—Order quashing Foreign Subpoena No. 79-66 insofar as it requires the production of National Bank Examiners' Reports. (N) Matthews, J.

Feb. 20—Notice of appeal by deft.; deposit of $5.00 by Michael A. Schuchat (copies to G. Westbrook Murphy and J. William Doolittle). filed Fees $5.00 Total $5.00

Feb. 21—Statement of deft. re stipulation of omissions.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, *Plaintiff*,

v.

PEAT, MARWICK, MITCHELL & Co.,
Defendants and Cross-Complainants

v.

THE CHASE MANHATTAN BANK, ET AL., *Cross-Defendants*

Misc. No. 61-66

Comptroller of the Currency's Motion To Quash or Modify Foreign Subpoena No. 79-66

The Comptroller of the Currency, by his undersigned attorneys, respectfully moves the Court to quash or modify Foreign Subpoena No. 79-66 upon the grounds that calls for the production of reports of national bank examinations, which reports are made unavailable to private litigants by pertinent statutes, especially 12 U.S.C. § 481. In support of this motion the Court is respectfully referred to the decision of the Court of Appeals in *Bank of America* v. *Douglas*, 70 App. D.C. 221, 105 F.2d 100 (1939); to the Affidavit of the Comptroller of Currency dated October 28, 1966, which is filed herewith and made a part hereof; and to the Comptroller's Memorandum of Points and Authorities which is filed herewith.

Respectfully submitted,

J. WILLIAM DOOLITTLE,
Acting Assistant Attorney General

HARLAND F. LEATHERS

C. WESTBROOK MURPHY

Attorneys, Department of Justice

Attorneys for the Comptroller of the Currency

Affidavit

DISTRICT OF COLUMBIA, SS:

James J. Saxon, being duly sworn, deposes, and says under oath, that:

1. I am Comptroller of the Currency duly appointed by the President of the United States, and, as Comptroller of the Currency, I have official custody and control of the files and records of the Office of the Comptroller of the Currency.

2. I have been advised that in connection with the above-captioned case pending in the Superior Court of the State of California in and for the County of Marin, that the defendants, Peat, Marwick and Mitchell & Company, et al., have caused a subpoena duces tecum to issue requesting the Comptroller to produce the following documents:

"1. Report of National Bank Examiner dated January 28, 1958 relating to loans made and/or credits advanced to Otis, McAllister & Co. by the plaintiff, Bank of America National Trust and Savings Association.

2. Any other memorandum or reports made during the years 1958-1961, inclusive, referring or relating to loans and/or credits advanced to Otis, McAllister & Co. by the said plaintiff.

3. All correspondence between the plaintiff and the Comptroller of the Currency or the National Bank Examiners (or copies thereof) written or received during the years 1958 through 1961, inclusive, referring or relating to loans and/or credits advanced to Otis, McAllister & Co. by the said plaintiff."

3. The Comptroller's Office has none of the documents called for by the subpoena other than the reports of national bank examiners.

4. The Comptroller of the Currency is responsible by law for the supervision and regulation of national banks. To aid in this supervision, the Comptroller, is required by 12 U.S.C. 481 to conduct an examination of every national bank at least three times in every two years. These examinations are conducted without prior notice to the naional bank involved in the examination. The results of each such examination are set down in a report, such as the report here sought to be subpoenaed, and furnished to the appropriate officials of the Comptroller's Office for study and possible action. These reports are the most effective means for obtaining the information essential to his statutory function of regulating national banks. It is and has always been the position of the Office of the Comptroller of the Currency that reports of examination of national banks are confidential documents of the Office of the Comptroller of the Currency, Department of Treasury.

5. National banks rely upon the confidentiality of these reports when they open their books and records to inspection by national bank examiners. The possibility that reports of examination might be required to be produced in court would make banks reluctant to furnish much of the information now made available, and would, as a result, impair the Comptroller's ability to perform his statutory duty of supervision of the national banking system.

6. Reports of examination contain sensitive financial information of a large number of customers not involved in the litigation, the disclosure of which information would adversely affect their interests.

7. Public misunderstanding owing to the public inability to evaluate the relative importance of matters criticized and discussed could unjustifiably weaken the confidence in a given national bank, should these reports be made a matter of public record.

8. The unvarying practice of the Comptroller under pertinent statutes has been to treat national bank examiner's reports as confidential and not available to the public or to private litigants except in the manner specifically authorized by 12 U.S.C. 481.

JAMES J. SAXON
James J. Saxon
Comptroller of the Currency

Subscribed and sworn to before me this 28th day of October 1966.

signed HELEN CRIST CRAVEL

SEAL

EXHIBIT A

T E L E G R A M

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GENL

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WUX WASHINGTON DC JULY 23 1965 937A EDT

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSN
S FRAN
ATTENTION: ELDON C PARR, COUNSEL

REFERENCE YOUR LETTER OF JULY 19, 1965, REGARDING ACTION FOR DAMAGES AGAINST PEAT, MARWICK, MITCHELL & COMPANY BY BANK. REPORTS OF EXAMINATION OF NATIONAL BANKS MADE BY THIS OFFICE ARE THE PROPERTY OF THE COMPTROLLER OF THE CURRENCY. COPIES THEREOF ARE LOANED TO THE NATIONAL BANK, WHICH IS THE SUBJECT OF THE REPORTS, SOLELY FOR ITS CONFIDENTIAL USE. UNDER NO CIRCUMSTANCES SHALL A NATIONAL BANK, OR ANY DIRECTOR, OFFICER, OR EMPLOYEE THEREOF, MAKE PUBLIC OR DISCLOSE TO ANY PERSON IN ANY MATTER A REPORT OF EXAMINATION OR ANY PORTION OF ITS CONTENTS. PARAGRAPH 6025(C) OF THE COMPTROLLER'S MANUAL FOR NATIONAL BANKS AND SECTION 4.13(B)(3)(IV) OF COMPTROLLER'S REGULATIONS (12 C.F.R. 4.13(B) (3)(IV). THE BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION IS NOT AUTHORIZED TO PRODUCE IN COURT ANY REPORT OF ANY EXAMINATION OR ANY PART THEREOF

JAMES J SAXON COMPTROLLER OF THE CURRENCY
811A JULY 23

19 1965 6025(C) 4.13(B)(3)(IV) 12 C F R 4.13(B) (3)(IV).

Affidavit of Willard P. Norberg in Opposition to Motion To Quash or Modify Foreign Subpoena No. 79-66

WILLARD P. NORBERG, being duly sworn, deposes and says under oath that:

1. I am one of the attorneys for Peat, Marwick, Mitchell & Co., defendants herein, and am authorized to make this affidavit on their behalf.

2. On May 7, 1965, in a civil action brought by Bank of America National Trust and Savings Association against Peat, Marwick, Mitchell & Co. and the partners thereof, in the Superior Court of the State of California in and for the County of Marin, counsel for defendants served upon plaintiff Bank of America a Notice of Motion for Order for Production of Documents. At a hearing on certain portions of this motion on July 19, 1965, defendants asked for production by Bank of America of all reports and comments of National Bank Examiners during the period from 1957 through 1961 relating to the Otis account or line of credit, the term "Otis" having previously been defined as Otis, McAllister & Co., a California coffee importing firm previously declared bankrupt. The action brought by Bank of America against Peat, Marwick, Mitchell & Co. involved a claim for recovery from Peat, Marwick, Mitchell & Co. of losses suffered by Bank of America as a result of the Otis bankruptcy.

3. At the hearing on July 19, 1965, counsel for Bank of America objected to production of such bank examiners' reports on the ground that the bank had a privilege protecting against such disclosure and that the Government, specifically the Comptroller of the Currency, also had a privilege which prevented production of such reports without the Comptroller's consent. The Court suggested at that hearing that it didn't believe that the bank, being a plaintiff in the case, could assert its privilege, if it had one, but indicated that if the privilege belonged to the Gov-

ernment, the only thing the defendant could do would be to get the Government's consent.

4. Accordingly, affiant thereafter by letter to the Comptroller of the Currency, dated July 30, 1965, requested that the bank examiners' reports in question, or copies thereof, relating to Otis, McAllister & Co. be made available for inspection by counsel for Peat, Marwick, Mitchell & Co. This request was accompanied by affidavit of affiant setting forth the reasons why such inspection was warranted under the circumstances.

5. Such request to the Comptroller having been denied by letter of August 25, 1965, affiant appealed to the Secretary of the Treasury by letter of August 31, 1965, to reverse the decision of the Comptroller. Such appeal to the Secretary of the Treasury was rejected by letter of September 21, 1965.

6. Thereafter, in order to obtain a court ruling as to the validity of the refusal of the Comptroller to permit inspection of those portions of the examiners' reports relating to Otis, McAllister & Co., affiant obtained a Commission, issued by the Superior Court of the State of California in and for the County of Marin, for the taking of the deposition of James J. Saxon, Comptroller of the Currency, and Notice of Taking the Deposition of Mr. Saxon was filed and served on opposing counsel. Based on such Commission and Notice, a Subpoena Duces Tecum was issued requesting the Comptroller to produce the requested bank examiners' reports at the taking of his deposition.

7. As previously set forth in an affidavit transmitted to the Comptroller of the Currency, the bank examiners' reports in question, copies of which had been furnished to the Bank of America, between 1957 and 1961 are directly relevant to various factual issues in the Bank of America's suit against Peat, Marwick, Mitchell & Co. now pending in the California court. Among the claims of the bank,

which are denied by Peat, Marwick, Mitchell & Co. are (1) that in extending credit to Otis the bank relied, as alleged, on the reports and financial statements of Otis, McAllister & Co. prepared by Peat, Marwick, Mitchell & Co.; (2) that the bank had a reasonable belief that the representations which it claims were made in said defendant's reports were in fact true; (3) that the bank would not have extended credit to Otis, McAllister & Co. if it had known what it alleges are the true facts concerning the financial condition of Otis and the status of security under trust receipts. In addition, said defendant contends that the bank was contributorily negligent in extending credit to Otis in the manner and to the extent alleged in the complaint.

In the course of discovery proceedings already completed in said action, I have learned that the National Bank Examiner, in a report dated January 28, 1958, which was received by Bank of America, commented unfavorably on the bank's loans to Otis. I am informed and believe that subsequent reports were made by the National Bank Examiner and received by the bank, which reports probably contain comments on the bank's loans to Otis. Because of the assertion of privilege, I have been unable to obtain more specific data with regard to the dates of such subsequent reports or the contents thereof.

8. Nondisclosure of the portion of such examiners' reports relating to Otis, McAllister & Co. will unfairly prejudice said defendant in its defense of said action, in that defendant will thereby be unable to produce evidence of highly important information which was known to Bank of America and which tends to substantiate the defenses stated above and to refute the allegations of the bank with respect to its lack of knowledge of the Otis financial situation and the reasonableness of its conduct under the circumstances.

9. Disclosure of the information requested will not be prejudicial to the public interest or to the national banking system for the following reasons:

a. Otis, McAllister & Co. was adjudged a bankrupt on March 16, 1962. Its business has subsequently been substantially liquidated. Disclosure of information relating to Otis, McAllister & Co. will not affect any presently existing business enterprise nor permit any advantage to be gained in speculative trading of securities of any existing corporation.

b. The matters as to which the requested reports relate occurred prior to 1962. The losses sustained by the bank in connection with loans to Otis, McAllister & Co. have been fully disclosed by the public records in the bankruptcy proceedings of Otis of Bankruptcy Action No. 65058 in the United States District Court for the Northern District of California, Southern Division, and by filing of the complaint in this action, which is a public document in the files of the Clerk of the County of Marin, State of California, and has already received newspaper publicity. The additional information contained in the requested reports cannot affect stability and welfare of national banks or other financial institutions or interfere with the privacy of confidential business relationships in view of the widespread public knowledge of the affairs of Otis, McAllister & Co., the involvement of the Bank of America therein, and the losses allegedly suffered by the bank as a result of the Otis bankruptcy. The good judgment of the bank in extending credit to Otis is also already in issue in this public court proceeding, and permitting disclosure of information known to the bank at the time it extended credit to Otis cannot prejudice the public interest or public welfare in any respect.

10. Peat, Marwick, Mitchell & Co. is the defendant in other substantially identical suits filed against it by The Chase Manhattan Bank and J. Henry Schroder Banking Corporation in the same Marin County Superior Court in California. Faced with the same request for copies of reports relating to Otis, McAllister & Co. prepared by the New York State Banking Department, the New York State

Banking Department voluntarily consented to the production of such reports covering the years 1957 through 1961, thereby indicating that in its opinion neither public policy nor the banking community would be adversely affected by production of reports relating to a bankrupt corporation, where the banks in question had initiated litigation relating to the affairs of such corporation. A copy of letter from E. Virgil Conway, First Deputy Superintendent, State of New York Banking Department, to Mr. Frederick W. Bardusch, Vice-President, The Chase Manhattan Bank, dated November 12, 1965, authorizing the production of such reports, is attached hereto as Exhibit A. Attached hereto as Exhibits B and C are excerpts from the 1960 reports of the New York State Banking Department relating to loans to Otis, McAllister & Co. by Chase and Schroder, respectively, which the New York Banking Department voluntarily agreed might be produced, together with similar reports for 1958, 1959 and 1961, for inspection by counsel for Peat, Marwick, Mitchell & Co.

Dated: November 3, 1966.

WILLARD P. NORBERG
Willard P. Norberg

Subscribed and sworn to before me
this 3rd day of November 1965.

(SEAL) MARGARET A. ADAMS
Margaret A. Adams

Notary Public in and for the City
and County of San Francisco,
State of California

My Commission Expires: October 13, 1967.

Exhibit A

From

STATE OF NEW YORK BANKING DEPARTMENT
100 Church Street New York 7, N. Y.

November 12, 1965

Mr. Frederick W. Bardusch
Vice President
The Chase Manhattan Bank
One Chase Manhattan Plaza
New York, New York

Dear Mr. Bardusch:

This will acknowledge your letter of November 8, 1965 in which you inform me that The Chase Manhattan Bank has no objection to making available to the counsel for Peat, Marwick, Mitchell & Co. certain information contained in our examination reports relating to loans made by the bank to Otis, McAllister & Co.

You may consider this letter authorization under the provisions of Section 36(10) of the New York State Banking Law to make available to the Messrs, Phillips, Nizer, Benjamin, Krim & Ballon, counsel for Peat, Marwick, Mitchell & Co. extracts from the bank's copy of the annual examination reports of the New York State Banking Department for the years 1957 through 1961 of material in such reports referring to loans or advances by The Chase Manhattan Bank to Otis, McAllister & Co.

Yours very truly,

E. VIRGIL CONWAY
E. Virgil Conway
First Deputy Superintendent

J. [illegible] CORPORATION — Examined Close of Business JUNE 24, 1960

LOANS SUBJECT TO ADVERSE CLASSIFICATION

This schedule includes all loans, or parts thereof, classified as substandard, doubtful, or loss. Substandard classification is defined as: Loans or portions thereof, not classified as doubtful, or loss, which involve more than a normal risk due to the financial condition or unfavorable record of the obligor, insufficiency of security, or other factors noted in the examiner's comments. All loans classified as "substandard" should be given special corrective attention, for example, by obtaining suitable reductions in amount, additional security, or more complete data concerning the obligor's financial condition; or by taking such other action as the specific circumstances may require.

Amount	NAME OF BORROWER, COMMENTS, AND REASON FOR CLASSIFICATION	CLASSIFICATIONS		
		SUBSTANDARD	DOUBTFUL	LOSS
	Otis McAllister & Co, Inc.			
	(A) Otis McAllister & Co. Inc.			
	(B) W.E. Waldschmit & Co. (Gtd. by (A)			
1,075,023	(A) Acceptances			
14,403	(B) "			
671,896	(A) Demand Loan			
117,421	(B) " "			
1,878,748		1,878,748		
	Collateral consists of trust receipts covering coffee.			
	Unused balance of letters of credit and commitment to loan total $54,132.			

Exhibit B

J. [illegible] SCHOOL FABRICS CORPORATION — Examined Close of Business JUNE 29, 1960

LOANS SUBJECT TO ADVERSE CLASSIFICATION

This schedule includes all loans, or parts thereof, classified as substandard, doubtful, or loss. Substandard classification is defined as: Loans or portions thereof, not classified as doubtful, or loss, which involve more than a normal risk due to the financial condition or unfavorable record of the obligor, insufficiency of security, or other factors noted in the examiner's comments. All loans classified as "substandard" should be given special corrective attention, for example, by obtaining suitable reductions in amount, additional security, or more complete data concerning the obligor's financial condition; or by taking such other action as the specific circumstances may require.

Amount	NAME OF BORROWER, COMMENTS, AND REASON FOR CLASSIFICATION	CLASSIFICATIONS		
		SUBSTANDARD	DOUBTFUL	LOSS
	Chas McAllister & Co. Inc. (Cont'd.) Company's finances have been extremely muddled in recent years due to heavy investments in foreign concerns and in non-allied lines of business. Such drains upon working funds have resulted in an inverse working capital position; the company's equity is invested in real estate and a hotel. The reported liquidation of various ventures has not been noticeably reflected in the financial reports furnished to date. F/S 6/30/59 - C/A 2/,1/,8M, C/L 27,833M, L/T debt 3,387M, K/W 11,122M. Sales 1/1,871M, operating loss 932M although non-recurring surplus adjustments resulted in a net increase of 1,320M in surplus account. In the current fiscal year it is reported additional progress in liquidation of investments has occurred and from which considerable cash receipts were realized. However, pending tangible evidence of the improved financial position, the company bears continued close surveillance and the substandard classification is again accorded its obligations.			

Exhibit C

THE CHASE MANHATTAN BANK

Examined Close of Business 2/16/60

LOANS SUBJECT TO ADVERSE CLASSIFICATION

This schedule includes all loans, or parts thereof, classified as substandard, doubtful, or loss. Substandard classification is defined as: Loans or portions thereof, not classified as doubtful, or loss, which involve more than a normal risk due to the financial condition or unfavorable record of the obligor, insufficiency of security, or other factors noted in the examiner's comments. All loans classified as "substandard" should be given special corrective attention, for example, by obtaining suitable reductions in amount, additional security, or more complete data concerning the obligor's financial condition; or by taking such other action as the specific circumstances may require.

INTERNATIONAL DEPARTMENT

OTIS, MCALLISTER AND CO. AND SUBSIDIARIES

(A) Otis, McAllister and Co., San Francisco
(B) Do Export Division
(C) National Paper and Type Co. (Wholesale Printers' Supplies Division)
(D) American Instants Inc.—(Owned 2/3ds by Duncan Coffee Co., and 1/3d by Otis McAllister.) Unlimited Gtee. of Otis McAllister.
(E) Waldschmidt and Co., Inc. (N.Y.) (Recently formed with unlimited gtee. of Otis McAllister).

Amount		Name of Borrower, Comments, and Reason for Classification			Classifications: Substandard	Doubtful	Loss
2,298,860	(A)	Demand Loan	(L/X	$ 186,545)			
77,306	(D)	Demand Loan	(L/X	70,508)			
79,876	(E)	Demand Loan	(L/X	New Corp.)			
5,028,515	(A)	Acceptances	(L/X	3,604,476)			
86,700	(D)	Do	(L/X	84,505)			
307,064	(E)	Do	(L/X	New Corp.)			
225,875	(A)	Advances	(L/X	142,616)			
3,457	(B)	Loans vs. Outward Bills	(L/X	93,550)			
179,982	(C)	Do	(L/X	438,953)			
8,287,635				$4,621,153	8,287,635		

Collateral consists of T/R's covering mainly coffee valued at $7,431M and W/R's and shipping documents covering same product valued at $674M and foreign collections drawn on subsidiaries and customers in Latin America totalling $183M. All current.

Unused balances of letters of credit and agreements to loan total $310,688.

Consolidated F/S of Otis McAllister and Co., and subsidiaries as of 6/30/59 shows C/A $24,448M (Cash $4,446M, Rec. $9,005M, Mdse. $9,769M, other assets listed as current $1,170M); C/L $27,833M or a deficit W/C of $3,385M. Term loans not included as current $3,387M. N/W—Cap. $7,500M, Surplus $3,922M. Sales year-ending 6/30/59 $141,871M with

INTERNATIONAL DEPARTMENT

Otis, McAllister and Co. and Subsidiaries (Continued)

an operating loss of $982M. However, sundry income of $1,251M, reduction of provision for U.S. Income Tax—$150M, income from foreign operations $90M; and net of gain and losses on sales and exchanges of foreign subsidiaries of $809M resulted in a net increase in surplus of $1,318M.

Net worth of $11,422M as of 6/30/59 appears to be predicated mainly on real estate of $8,092M and investment in Whitcomb Hotel, San Francisco, of $4,209M. No information as to location of real estate shown by CPA. The Whitcomb Hotel was originally purchased prior to 6/30/58 from funds of Otis McAllister and Co. and purported to be sold to Mr. Johnson (Chairman of Otis McAllister) and some of his friends and the funds placed back into the business through this sale. However, the hotel appears on the 6/30/59 F/S at $4,209M with an explanation by the CPA that the capital stock of nine (9) subsidiaries known as the South American National Paper Group was transferred in exchange for the capital stock of Karl C. Weber, Inc., owner and operator of the Whitcomb Hotel and adjacent properties. The carrying value of the stock of the nine South American subsidiaries is not ascertainable from available information and if there were any profit or loss on this transaction.

In November, 1959, subject sold the controlling interest in Duncan Coffee Co., for $4,500M in cash and about $3,500M in debentures and resulted in a net increase in surplus of subject of $1,681M.

Continued close supervision by bank is necessary to prevent this group of loans from further deterioration due to the unfavorable current position, large coffee inventory, lack of complete financial information in connection with the recent changes in its financial structure and operating policies and lack of separate operating figures for the coffee and hotel business.

Affidavit

DISTRICT OF COLUMBIA, ss:

William B. Camp, being duly sworn, deposes, and says under oath, that:

1. I am and have been since November 15, 1966, Acting Comptroller of the Currency. I have been associated with the Comptroller of the Currency's Office for almost thirty years, during which period I served for seven and one-half years as an Assistant National Bank Examiner, eleven and one-half years as a National Bank Examiner, and one year as Assistant Chief National Bank Examiner. On April 2, 1962, I was appointed Deputy Comptroller of the Currency and in October, 1963, I became First Deputy Comptroller of the Currency. In these various capacities I have been personally involved with hundreds of examinations of national banks and their branches made pursuant to 12 U.S.C., Section 481.

2. I understand that a subpoena has been issued in the above-captioned case directed to the Comptroller of the Currency and calling for the production of reports of national banks examinations made pursuant to 12 U.S.C., Section 481.

3. As stated in the affidavit dated October 28, 1966, filed herein by the then Comptroller of the Currency, James J. Saxon, the consistent 102 year old practice of the Comptroller's Office has been to treat reports of national bank examinations as confidential and not available to the public except as specifically authorized by statute. One of the reasons for this policy was stated in that affidavit as follows:

> 5. National banks rely upon the confidentiality of these reports when they open their books and records to inspection by national bank examiners. The possibility that reports of examination might be required to be produced in court would make banks reluctant

to furnish much of the information now made available, and would, as a result, impair the Comptroller's ability to perform his statutory duty of supervision of the national banking system.

4. The defendants Peat, Marwick, Mitchell & Co., have suggested in their opposition to the Comptroller's motion to quash Foreign Subpoena No. 79-66 that the effectiveness of national bank examinations does not depend on the willingness or reluctance of a bank being examined because 12 U.S.C., Section 481 gives the bank examiner the power to examine officers and agents of the bank under oath. The experience of the Comptroller of the Currency's Office has been, however, that national bank examiners must and do rely upon the full and voluntary cooperation of the bank being examined. I believe that the regular use of examinations under oath as provided in 12 U.S.C., Section 481 would lessen this voluntary cooperation, especially when coupled with the implication by Peat, Marwick, Mitchell & Co. that the reports based on such examinations should be made available to private litigants. The result of following the examining procedures suggested by Peat, Marwick, Mitchell & Co. would be to prevent the Comptroller's Office from obtaining bank examination reports with the complete, accurate, and candid information necessary to the effective discharge by the Comptroller's Office of its statutory duties.

5. The National Bank Act requires examination of each of the approximately 4800 national banks and their more than 9,200 branches at least three times in every two years. For this purpose the Comptroller maintains an examining staff of approximately 1,100, who conduct more than 25,000 examinations each year.

6. The present ability of this office to conduct more than 25,000 effective bank and branch examinations each year with the existing staff is made possible only by the willing cooperation of the banks involved. Besides being pro-

hibitively time consuming, the practice suggested by defendant Peat, Marwick, Mitchell & Co., of regularly obtaining information through compulsory sworn examinations would transform the present frank and complete voluntary exchanges between bank examiners and bank officers and employees into adversary type proceedings which would result in far more limited and cautious responses by bank officials, even when the information obtained is not available to anyone but members of the Comptroller's Office and others specifically authorized by statute. If the examination under oath procedure provided in 12 U.S.C., Section 481 were combined with the suggestion of Peat, Marwick, Mitchell & Co. that information obtained by such examinations should be made available to private litigants, I believe that the present practice by bank officials of volunteering information would vanish completely. Without the cooperation of the bank being examined and the volunteering of information by its officers and employees, national bank examiners could not obtain the full and accurate information necessary to the Comptroller's Office in its regulation of each of the more than 14,000 offices of national banks located throughout the United States.

7. For these reasons, national bank examiners have exercised their power to examine bank officials under oath only in the case of a recalcitrant or "problem" bank generally where there is a dispute between officials of the same bank over what occurred in a given transaction. Even in such unusual and extreme cases the power is used sparingly and in fact has been applied in less than one-tenth of one per cent of the more than 25,000 bank and branch examinations which are conducted annually.

8. For the same reasons, this office has never in any case known to me or apparent in the records of the office, published a bank's examination report as provided in 12 U.S.C., 481 for failure to comply with the recommendations contained in an examination report.

9. The daily operation of the Office of the Comptroller of the Currency is predicated upon the confidential relationships between the national bank examiners and bank management. Confidentiality of bank examination reports is essential to the maintenance of this working relationship and to the effective protection of the public interest by the Comptroller's Office.

WILLIAM B. CAMP
William B. Camp
Acting Comptroller of the Currency

Subscribed and sworn to before me this 10th day of January, 1967.

HELEN CRIST CRAVER

My Commission Expires Sept. 30, 1971

Order

This cause having come on for hearing upon the motion of the Comptroller of the Currency to quash or modify Foreign Subpoena No. 79-66 issued by this Court upon the ground that the Comptroller of the Currency should not be compelled to produce National Bank Examiners Reports, 12 U.S.C. 481, and upon consideration of the motion and memorandum of points and authorities in support thereof and in opposition thereto and upon consideration of the argument made by counsel in open court, it is by the Court this 2nd day of February 1967,

ORDERED that Foreign Subpoena No. 79-66 be, and the same is, hereby quashed insofar as it requires the production of National Bank Examiners Reports.

/s/ BURNITA SHELTON MATTHEWS
Judge

Notice of Appeal

Notice is hereby given this 20th day of February, 1967, that Peat, Marwick, Mitchell & Co. hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 2nd day of February, 1967 in favor of the Comptroller of the Currency against said Peat, Marwick, Mitchell & Co. quashing Foreign Subpoena No. 79-66 insofar as it requires the production of National Bank Examiners Reports.

MICHAEL A. SCHUCHAT
Attorney for
Peat, Marwick, Mitchell & Co.

G. WESTBROOK MURPHY
Department of Justice
Attorney for Comptroller of Currency

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 20,855

PEAT, MARWICK, MITCHELL & CO.,

Appellant

v.

COMPTROLLER OF THE CURRENCY,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARL EARDLEY,
Acting Assistant Attorney General,

DAVID G. BRESS,
United States Attorney,

MORTON HOLLANDER,
ROBERT V. ZENER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether national bank examiners' reports, based on information obtained in confidence from the bank and critical of transactions in which the bank engaged, may be subpoenaed for use against the bank in civil litigation.

I N D E X

CITATIONS

Cases:

* Authorities chiefly relied upon are marked by an asterisk.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,855

PEAT, MARWICK, MITCHELL & CO.,

Appellant

v.

COMPTROLLER OF THE CURRENCY,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNTER-STATEMENT OF THE CASE

The Comptroller of the Currency is required by law to appoint examiners, who must examine the affairs of every national bank at least three times every two years. 12 U.S.C. 481. (Two examinations a year are required, but the Comptroller may waive one such examination every two years. Ibid.) The examiner is required to make a full and detailed report of the condition of the bank under examination to the Comptroller of the Currency. Ibid. The Comptroller is authorized to publish this report if the bank, within 120 days after it has been notified of the Comptroller's recommendations

based on the examination, fails to comply with them to the satisfaction of the Comptroller. Ibid. The Comptroller's regulations provide that reports of bank examinations are "confidential information" and will not be disclosed, except when the Comptroller determines that such disclosure is authorized by law and in the public interest. 12 C.F.R. 4.13(b)(2), 4.13(b)(3)(i). The Comptroller makes a copy of the report available to the bank itself, in order to enable it to comply with his recommendations. 12 C.F.R. 4.13(b)(3)(iv); 12 U.S.C. 481. The regulations state that this copy is loaned to the bank for its confidential use only, and may not be disclosed to any other person. 12 ~~U.S.C.~~ C.F.R. 4.13(b)(3)(iv).

The present case concerns an attempt to subpoena national bank examiners' reports for use against the bank in civil litigation, where there is no showing that the reports were subject to disclosure under 12 U.S.C. 481 because the bank failed to comply with the Comptroller's recommendations. The civil litigation in question is a suit by Bank of America National Trust & Savings Association (the "Bank") against appellant, a national accounting firm. (JA 8a). In this suit, brought in the Superior Court of California for Marin County, the Bank is seeking to recover its losses incurred in extending credit to Otis, McAllister & Co. ("Otis"). The Bank alleged that it relied on false and incomplete financial statements prepared by appellant. One of appellant's defenses was that

the Bank knew or should have known of Otis' true financial condition, and was negligent in making the loan. It is in connection with this defense that appellant seeks production of the national bank examiner's reports. (JA 8a-10a).

In discovery proceedings in the California court, appellant obtained information indicating that the examiner's report of January 28, 1958, was critical of the Bank's loans to Otis. (JA 10a). Appellant moved in the California court for production of this report and other reports covering 1958-61, but the Bank refused to produce these reports on instructions from the Comptroller. (JA 7a, 8a-9a). Both the Comptroller and the Secretary of the Treasury denied appellant's request for release of the report. Ibid. The California court then issued a commission to take the deposition of the Comptroller in the District of Columbia, and Foreign Subpoena No. 79-66 issued from the District Court pursuant thereto, requiring production of the requested reports. (JA 9a).[1/]

1/ The subpoena, which was omitted from the Joint Appendix but which is contained in the Supplemental Original Record on Appeal, required the Comptroller of the Currency to produce the following documents:

> "1. Report of National Bank Examiner dated January 28, 1958 relating to loans made and/or credits advanced to Otis, McAllister & Co. by the plaintiff, Bank of America National Trust and Savings Association.
>
> "2. Any other memoranda or reports made during the years 1958-1961, inclusive, referring or relating to loans and/or credits advanced to Otis, McAllister & Co. by the said plaintiff.
>
> "3. All correspondence between the plaintiff and the Comptroller of the Currency or the National Bank Examiners (or copies thereof) written or received during the years 1958 through 1961, inclusive, referring or relating to loans and/or credits advanced to Otis, McAllister & Co. by the said plaintiff."

The Comptroller moved to quash the subpoena, on the basis of 12 U.S.C. 481, which, in the Comptroller's view, prohibits disclosure of examiners' reports except where specifically authorized by law. The Comptroller submitted affidavits explaining that the practice of the Comptroller's office for 102 years, under the statute requiring national ban to examinations, has been to treat reports of the examinations as confidential, one reason being that banks would be less willing to cooperate with the examiners if the banks knew that the reports would be available for use against them in private litigation. (JA 4a-6a). Since the Comptroller took the view that the law prohibited disclosure, no formal claim of executive privilege was filed.

On February 2, 1967, the district court entered an order quashing the subpoena. (JA 22a).[2/] This appeal followed.

STATUTE AND REGULATION INVOLVED

12 U.S.C. 481 provides in relevant part:

> The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every national bank twice in each calendar year, but the Comptroller, in the exercise of his discretion, may waive one such examination or cause such examinations to be made more frequently if considered necessary. The waiver of one such examination as above provided shall not be exercised more frequently than once during any two-year period. The examiner making the examination of any national bank shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of

---

2/ The subpoena was quashed "insofar as it requires the production of National Bank Examiners Reports." (JA 22a). The Comptroller's office has no documents covered by the subpoena other than these reports.

the Currency: * * * The Comptroller of the Currency shall have power, and he is authorized, to publish the report of his examination of any national banking association or affiliate which shall not within one hundred and twenty days after notification of the recommendations or suggestions of the Comptroller, based on said examination, have complied with the same to his satisfaction. Ninety days' notice prior to such publicity shall be given to the bank or affiliate.

12 C.F.R. 4.13(b) provides in relevant part:

(b) Nondisclosure of confidential information--(1) Reasons for nondisclosure. In connection with the supervisory, regulatory, investigative, examining, and other functions vested by law in the Comptroller of the Currency, the Comptroller receives information which must be safeguarded in the public interest in order to protect the national banking system and to enable the Comptroller to administer properly his responsibilities. Improper disclosure of such information could:

(i) Adversely affect the stability and welfare of national banks or other financial institutions to which the information relates:

(ii) Unreasonably, unnecessarily, and improperly disturb and interfere with confidential business relationships and otherwise encroach upon the right to privacy of business transactions of national banks and other financial institutions, their customers, and other persons dealing with them;

(iii) Constitute a breach of confidence between the Comptroller and those dealing with him, thus interfering with performance of the Comptroller's statutory duties and impeding the collection of information and advice by the Comptroller, much of which cannot be obtained except on a voluntary and confidential basis;

(iv) Permit speculators and others unfairly to reap profits and to gain advantages in speculative trading in securities and otherwise;

(v) Cause misinterpretations and misunderstandings of the Comptroller's policies and purposes resulting in disturbance of securities markets and impairment of public confidence in a national bank, the national banking system, or other financial institutions.

(2) Definition of confidential information. For purposes of this paragraph, the term "confidential information" means information set forth in files, correspondence, memoranda, documents, reports, books, records, and other papers of the Comptroller of the Currency, whether located in the Comptroller's office or elsewhere, which relates to or is derived from:

(i) Reports of examination or condition, investigations, and inspections of any national bank or other financial institution, or of a holding company, subsidiary, or affiliate thereof;

* * *

(3) Rules of nondisclosure--(i) Comptroller. Except as provided in subdivisions (iii) and (iv) of this subparagraph, or in other circumstances in which the Comptroller of the Currency determines that disclosure is authorized by law and in the public interest, the Comptroller, for the reasons set forth in subparagraph (1) of this paragraph, will not make available or otherwise disclose any confidential information, as defined in subparagraph (2) of this paragraph, whether or not such information is a matter of official record within the meaning of the Administrative Procedure Act.

* * *

(iv) Financial institutions. The Comptroller of the Currency makes available to each national bank and, in some cases, holding companies thereof, a copy of the report of examination of such bank or company. The report of examination is the property of the Comptroller and is loaned to the bank or holding company for its confidential use only. Under no circumstances shall the bank or holding company or any director, officer or employee thereof make public or disclose to any other banker or person in any manner the report of examination or any portion of the contents thereof.

SUMMARY OF ARGUMENT

The long-standing policy of the Comptroller to treat national bank examiners' reports as confidential, is a reasonable administrative construction of the governing statute. 12 U.S.C. 481 authorizes the Comptroller to publish an examiner's report only if the national bank, after a specified period, fails to comply with the Comptroller's recommendations based on the examination. In the Comptroller's view, this means that the report is to be treated as confidential if the bank does comply. This view has been communicated to Congress, which has recognized it in several subsequent statutes authorizing disclosure of the reports to certain other government agencies (such as the Securities and Exchange Commission) for limited purposes, with the requirement that these agencies also keep the reports confidential. Congressional recognition of the policy of confidentiality came as recently as last year, when national bank examiners' reports were exempted from the disclosure requirements of the Freedom of Information Act, P.L. 89-487 (July 4, 1966), 80 Stat. 250.

The rule of non-disclosure has ample basis in policies applicable to this case. The Comptroller must conduct approximately 25,000 bank examinations each year. To conduct these examinations effectively, he must have the voluntary cooperation of the banks involved. While the Comptroller does have power to compel testimony and production of documents, examinations

conducted with the voluntary cooperation of the bank are much less cumbersome and generally produce more information. If it is known that criticisms made by examiners may be available to the parties in private litigation, banks will inevitably be reluctant to be completely frank with examiners. As a result, the Comptroller's conduct of bank examinations will be hampered.

The "protective" measures which appellant offers do not solve the problem. In essence, these measures amount to confining the subpoena to those portions of the examiners' reports which are relevant to the litigation between appellant and the Bank. But the fact that portions of examiners' reports may be relevant to civil litigation is the reason for the policy of confidentiality; which seeks to prevent disclosure of those portions of the reports which would be relevant to appellant's litigation with the Bank.

ARGUMENT

The statute requiring periodic examination of national banks makes it clear that the Comptroller is authorized to publish the report of his examination only where the bank has failed to comply with the Comptroller's recommendations based on the examination. Thus the statute authorizes publica-

one hundred and twenty days after notification of the recommendations or suggestions of the Comptroller, based on said examination, have complied with the same to his satisfaction."

12 U.S.C. 481. To make certain that the bank has a fair opportunity to avoid publication by compliance, the statute goes on to require that "[n]inety days' notice prior to such publicity shall be given to the bank." Ibid.

The purpose of these provisions is not difficult to ascertain. Obviously, examiners' reports constitute a convenient compendium of criticism of bank transactions, to which any lawyer engaged in civil litigation with the bank would turn if the reports were available to him. The Comptroller's power to publish these reports represents a strong incentive for banks to comply with the Comptroller's recommendations and thereby avoid disclosure in litigation. In this manner, the examinations which the statute requires become more than merely a means of keeping the Comptroller informed; the power of publication which the statute grants to the Comptroller enables him in effect to compel banks to take steps to correct situations which weaken their financial condition.

Implicit, however, in the threat of publication if the bank does not comply, is the promise of confidentiality if the bank does comply. Thus the Comptroller's long-standing practice under 12 U.S.C. 481 has been to treat national bank authorized under that statute because of the bank's failure to comply with his recommendations, or unless disclosure is

specifically required by some other statute. As the affidavit of the present Comptroller states, "the consistent 102 year old practice[3] of the Comptroller's Office has been to treat reports of national bank examinations as confidential and not available to the public except as specifically authorized by statute." (JA 19a).

This consistent administrative practice must be upheld unless clearly unreasonable and inconsistent with the statute. Federal Housing Administration v. The Darlington, Inc., 358 U.S. 84, 90; Udall v. Tallman, 380 U.S. 1, 16. The administrative practice, moreover, has special weight in view of the fact that Congress has been informed of it and has made no change in the statute. United States v. Davison Fuel and Dock Company, 371 F. 2d 705, 711-12 (C.A. 4). See Bank of America National Trust and Savings Ass'n v. Douglas, 70 App. D.C. 221, 224, 105 F. 2d 100, 103 (C.A.D.C.) (giving examples of testimony before Congressional committees explaining the administrative policy of confidentiality).[4]

3/ 12 U.S.C. 481 was originally enacted in 1864. 13 Stat. 116.

4/ The Court in the Bank of America case referred to "(1) the testimony of Chairman Douglas of the [Securities and Exchange] Commission in the hearings on the Barkley bill, to the effect that examiners' reports ought not to be made public [citing Hearing, Senate Committee on Banking and Currency, S. 2344, 75th Cong., 1st Sess. (1937), p. 71]; (2) the testimony of the Comptroller in the Pujo investigation that the reports of examiners had always been regarded as confidential [citing Hearings, House Committee on Banking and Currency, H.R. 429 and 504 (1912-1913), Money Trust Investigation, 62d Cong., 2d Sess., Vol. 2, pt. 19, p. 1391]." 70 U.S. App. D.C. at 224, 105 F. 2d at 103.

That Congress is aware of, and approves, the Comptroller's policy of confidentiality, is made doubly apparent by several federal statutes. Thus the Federal Reports Act of 1942, 5 U.S.C. 139, which provided for the sharing of information among federal agencies, specifically exempted "the obtaining or releasing of information by the * * * Comptroller of the Currency" and "the obtaining by any Federal supervisory agency of reports and information from banks as provided or authorized by law." 5 U.S.C. 139a(e). And where Congress has seen fit to authorize other federal agencies to inspect bank examiners' reports, it has specified that the agency hold such reports in confidence. Thus the Federal Farm Loan Act authorized the Comptroller to furnish his reports concerning certain national banks for the "confidential use" of any federal intermediate credit bank. 12 U.S.C. 1091. Similarly, the Federal Home Loan Bank Act authorized the Comptroller to make available to the Federal Home Loan Bank Board "in confidence" reports relating to the condition of institutions with which a federal home loan bank has transactions. 12 U.S.C. 1442. In addition, the Federal Farm Loan Act permitted the Comptroller to make available "in confidence" to the Farm Credit Administration reports concerning the condition of any institution with which the Administration has certain specified transactions. 12 U.S.C. 1095. And the Comptroller is authorized to disclose reports concerning trustees or prospective trustees of indentures to the Securities and Exchange Commission, under restrictions as to further disclosure. 15 U.S.C. 77uuu(b).

Finally, the so-called Freedom of Information Act, which Congress passed just last year, and which contains liberal provision for availability to the public of information in government files, specifically exempts matters "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions." P.L. 89-487 (July 4, 1966, effective July 4, 1967), 80 Stat. 250.

The policy of confidentiality has ample basis in the purpose of the statute requiring periodic examination of national banks. Especially pertinent here is the danger that a breach of the confidentiality of examiners' reports would make banks reluctant to freely disclose information to examiners and thus impede the examination process provided for by 12 U.S.C. 481. Thus the Comptroller's regulation states that improper disclosure of information derived from examiners' reports would:

> Constitute a breach of confidence between the Comptroller and those dealing with him, thus interfering with performance of the Comptroller's statutory duties and impeding the collection of information and advice by the Comptroller, much of which cannot be obtained except on a voluntary and confidential basis.

12 C.F.R. 4.13(b)(1)(iii).

The affidavit of James J. Saxon, former Comptroller of the Currency, filed in this action (JA 4a-6a), explains more fully the necessity of confidentiality if the Comptroller is adequately to discharge his statutory duty of examining national banks, and exercising supervision over these banks (JA 5a):

> National banks rely upon the confidentiality of [examiners'] reports when they open their books and records to inspection by national bank examiners. The possibility that reports of examination might be required to be produced in court would make banks reluctant to furnish much of the information now made available, and would, as a result, impair the Comptroller's ability to perform his statutory duty of supervision of the national banking system.

Appellant points out that 12 U.S.C. 481 gives the Comptroller the power to question national bank employees under oath in the course of an examination, and that any bank refusing to submit to examination is subject to forfeiture of its charter and a penalty of $100 a day. Thus, it is argued, the Comptroller does not need the voluntary cooperation of the banks in order to get the information he needs: even if the reports were not confidential, the Comptroller is legally entitled to compel full disclosure to his examiners.

This argument, however, ignores the realities of the examining process. As pointed out in the affidavit of William B. Camp, present Comptroller of the Currency (JA 19a-22a), the use of questioning under oath and compulsory process to obtain information

> would transform the present frank and complete voluntary exchanges between bank examiners and bank officers and employees into adversary type proceedings which would result in far more limited and cautious responses by bank officials, * * *.

(JA 21a). Mr. Camp states that, if examinations were conducted under oath, with the bank knowing that information resulting from the examination would be available to private litigants,

> I believe that the present practice by bank officials of volunteering information would vanish completely. Without the cooperation of the bank being examined and the volunteering of information by its officers and employees, national bank examiners could not obtain the full and accurate information necessary to the Comptroller's Office in its regulation of each of the more than 14,000 offices of national banks located throughout the United States.

(JA 21a). Mr. Camp points out that, because of the inhibitions to the free flow of information which the formal process of examination under oath entails,

> National bank examiners have exercised their power to examine bank officials under oath only in the case of a recalcitrant or "problem" bank generally where there is a dispute between officials of the same bank over what occurred in a given transaction. Even in such unusual and extreme cases the power is used sparingly and in fact has been applied in less than one-tenth or one percent of the more than 25,000 bank and branch examinations which are conducted annually.

(JA 21a).

Appellant's offer of "protective" measures, which would restrict the material disclosed to those portions of the examiners' reports relevant to appellant's litigation with the Bank, does not meet the problem. Confidentiality is

necessary precisely because portions of examiners' reports might be relevant to private litigation: a primary purpose of confidentiality is to prevent the disclosure of such relevant portions. Thus excision of irrelevant portions of the reports would not alleviate the effect of the breach of confidence, nor in any way restore national banks' present willingness freely to disclose information to examiners which might be relevant to civil litigation.

The long-standing administrative practice of treating examiners' reports as confidential was recognized and given effect by this Court in Bank of America Nat. Trust & Savings Ass'n v. Douglas, 70 U.S. App. D.C. 221, 105 F. 2d 100. There it was held that the Securities and Exchange Commission, which had obtained examiners' reports from the Comptroller in connection with investigation of a Securities Act violation, could not make the reports public:

> In a number of instances Congress has specifically authorized use of reports "in confidence", and the only statutory reference to publicity is the Comptroller's qualified authority to publish the report on any bank which fails to comply with his recommendations.
>
> * * *
>
> As we have already pointed out, the unbroken administrative practice of the Secretary and the Comptroller, as well as the course of Congressional legislation, manifests a fixed purpose to confine the outside use of such information to criminal prosecutions, tax suits, and the like. And this is true because of the nature of banking, as to which, by universal recognition, public confidence is essential.

70 U.S. App. D.C. at 224, 105 F. 2d at 103.

It should be emphasized that this is not a case in which the Government, as a party to the underlying litigation, is attempting to assert or defend a claim while at the same time depriving its opponent of information needed to overcome the Government's position. See, e.g., United States v. San Antonio Portland Cement Company, 33 F.R.D. 513, 515 (D. Colo.) ("It would be unconscionable * * * for the Government to be permitted to prosecute this suit * * * and then invoke governmental * * * privilege * * * to deprive the defendant of matters which might be material to its defense.") Where the Government is a party to the underlying litigation, fairness may justify rejecting the Government's need for confidentiality in favor of its opponent's need for information. This consideration, however, is not present here, since the Government is not a party to the suit between appellant and the Bank.

Furthermore, in the situation where the Government is a party and the court believes that governmental documents should be produced despite an asserted need for confidentiality, the Government still has the option of protecting the confidentiality of the documents by abandoning its position on the merits of the factual dispute to which the documents relate. See, e.g., Reynolds v. United States, 192 F. 2d 987, 998 (C.A. 3), rev'd on other grounds, 345 U.S. 1 (findings of fact against Government may be entered on basis of Government's refusal to produce documents). Thus the court is not in the position of forcing

divulgence of information which the Government believes should be kept confidential. Rather, the Government is simply put to the choice of divulging the information or abandoning its claim. However, where, as here, the Government is not a party to the underylying litigation, no such choice is open to it: if the court orders production, there is no way of preserving confidentiality. 5/

The cases relied on by appellant do not reach the issue here involved. In Overby v. United States Fidelity and Guaranty Co., 224 F. 2d 158 (C.A. 5), the court was faced with a claim of executive privilege with respect to national bank examiners' reports. However, the court did not reach the question of whether the claim should be sustained. Rather, it found that, in the interests of avoiding a conflict between the executive and the courts, the scope of the subpoena should be narrowed. The court specifically refrained from deciding whether a more narrowly drawn subpoena would be enforced if the Treasury Department continued to resist production. 224 F. 2d at 163-4.

5/ See 4 Moore's Federal Practice, para. 26.25(5): "where the Government is not a party, the only sanction which the court has to enforce a discovery order against it is a contempt citation; but it would not be seemly for a federal court to hold a cabinet officer or head of a department in contempt, and certainly not for a state court to do so, and it is doubtful whether the court would have the power to take such action."

Bank of Dearborn v. Saxon, 244 F. Supp. 394 (E.D. Mich.) and Community National Bank of Pontiac v. Gidney, 192 F. Supp. 514 (E.D. Mich.), aff'd on other grounds 310 F. 2d 224 (C.A. 6), are also irrelevant. In both cases the records sought related to applications for the establishment of branch offices.

In United States v. Provident National Bank, et al., 41 F.R.D. 209 (E.D. Pa.), the court did require production of portions of examiners' reports. However, in that case identification of particular names and transactions was not required, and the court permitted protective measures which prevented identification of particular transactions.[6/] Moreover, the court recognized the interest in confidentiality which the Comptroller is asserting in the case at bar (41 F.R.D. at 210):

> It is in the public interest that there be a well-functioning bank regulatory system, and a well-functioning system is built on the relationship between the Comptroller and his bank examiners and the banks. Without a relationship grounded in mutual confidence, there could be a serious breakdown in the system. As it is now, the banks feel free to "tell all" to the examiner, but if these reports became public, this "tell all" feeling could cease. The banks might feel it necessary to protect themselves against any adverse observation by an examiner if such reports were to be freely disclosed. This the Court will not chance.

6/ The Provident National Bank case was an anti-trust action, in which production of examiners' reports was sought to establish various statistical questions as to the bank's loan business. (A transcript of a conference in chambers in the Provident case concerning protective measures, and an affidavit concerning such measures, appear in the Record on Appeal in the instant case, as Appendix B and Appendix C to the Reply Brief for the Comptroller of the Currency in Support of Motion to Quash or Modify Subpoena.)

Appellant asserts a number of reasons why, in its view, on the facts of this case, the bank examiners' reports should be produced. It is argued that they are relevant to the litigation between appellant and the Bank, that the reports are six to eight years old, and that the company to which the loans were made is bankrupt and thus not in a position to be hurt by disclosure. Thus, it is argued, the need for disclosure outweighs any need for confidentiality on the facts of this case. In effect, appellant argues that the question of disclosure of bank examiners' reports should be decided on the basis of the particular facts of the case, rather than on the basis of a general rule of non-disclosure.

This argument misconceives the issue on this appeal. In the first place, this is a case where 12 U.S.C. 481, as interpreted and applied by the Comptroller, prohibits disclosure. The question before the Court is whether the Comptroller's interpretation of the statute is correct -- that is, whether the law prohibits disclosure of examiners' reports except in those instances where disclosure is specifically authorized by statute. This question clearly does not depend on the facts of the particular case in which disclosure is sought (except to the extent necessary to determine whether disclosure is specifically authorized by 12 U.S.C. 481 or some other statute).

If the Court should decide that 12 U.S.C. 481 does not prohibit disclosure, then the Secretary of the Treasury may decide to assert a formal claim of executive privilege in this case (such a claim has not yet been asserted). The Secretary would then be obliged to review the particular facts of the case as against the administrative policy of confidentiality. However, this case-by-case weighing process becomes relevant only upon a formal claim of executive privilege, and not when the question is the meaning of 12 U.S.C. 481.

There might be a superficial attractiveness to the notion that the question of confidentiality for examiners' reports should be decided on a case-by-case basis, in the context of formal claims of executive privilege, rather than on the basis of interpretation of 12 U.S.C. 481. However, it is apparent that this approach would substantially undermine the reasons why Congress has required that these reports be kept confidential. For there will inevitably be many cases in which it will be concluded that the reports are necessary and that an exception to the policy of confidentiality should be made. But bank officials will not be in a position to know beforehand in which cases an exception will be made. Thus to protect themselves and their depositors and stockholders, they will be reluctant in any case to "tell all" to the examiners.

In short, Congress has required the Comptroller to conduct examinations of national banks, and has authorized disclosure of the examination reports in particular, defined situations. The Comptroller's construction of the statute has been that, apart from these situations defined by statute, the reports are confidential. This is a reasonable administrative

interpretation and, as such, must be upheld. To hold that the requirement of confidentiality must give way in particular cases, on the ground that the need for disclosure is pressing, would undermine the policy of the law, since the bank officials who must rely on the confidentiality of the reports would have no way of predicting when confidentiality would be breached.

CONCLUSION

For the foregoing reasons, the district court's order quashing Foreign Subpoena No. 79-66 should be affirmed.

Respectfully submitted,

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